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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 SERGIO AMARO PEREZ,) No. CV 11-1068-PHX-RCB (MEA)
9 Plaintiff,) **ORDER**
10 vs.)
11 DETECTIVE BELL, et al.,)
12 Defendants.)
13 _____)

14 Plaintiff Sergio Amaro Perez, who is confined in the Arizona State Prison Complex,
15 Central Unit, in Florence, Arizona, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C.
16 § 1983, which the Court dismissed for failure to state a claim with leave to amend. (Doc. 1,
17 7.) Plaintiff has filed a First Amended Complaint. (Doc. 9.) The Court will order
18 Defendants Bell and Park to answer Count I of the First Amended Complaint and will
19 dismiss the remaining Defendant without prejudice.

20 **I. Statutory Screening of Prisoner Complaints**

21 The Court is required to screen complaints brought by prisoners seeking relief against
22 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
23 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
24 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
25 be granted, or that seek monetary relief from a defendant who is immune from such relief.
26 28 U.S.C. § 1915A(b)(1), (2).

27 A pleading must contain a “short and plain statement of the claim *showing* that the
28 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not

1 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
2 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
3 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
4 statements, do not suffice.” Id.

5 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
6 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,
7 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
8 that allows the court to draw the reasonable inference that the defendant is liable for the
9 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
10 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
11 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
12 allegations may be consistent with a constitutional claim, a court must assess whether there
13 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

14 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
15 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th
16 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
17 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,
18 94 (2007) (*per curiam*)).

19 **II. First Amended Complaint**

20 Plaintiff alleges one count for the excessive use of force.¹ Plaintiff sues the Mesa
21 Police Department and its Detectives Bell and Park. Plaintiff seeks injunctive and
22 compensatory relief.

23 Plaintiff alleges the following facts: On February 24, 2009, Defendants Bell and Park
24 ordered Plaintiff to “stop and get on the ground.” (Doc. 9 at 3.) As Plaintiff was doing so,

26 ¹ On January 11, 2011, Plaintiff was convicted by a jury of three counts of
27 kidnapping, five counts of theft by extortion, three counts of aggravated assault, and one
28 count of theft of the means of transportation and sentenced to several decades in prison in the
Superior Court in Maricopa County, case# CR2009-113981. See <http://www.courtminutes.maricopa.gov/docs/Criminal/012011/m4547247.pdf> (last visited July 5, 2011).

1 Bell and Park threw him to the ground very hard and Bell slammed his knee into Plaintiff's
2 lower back. After being handcuffed and picked up to be led out of the house, Plaintiff was
3 unable to walk due to pain. Park again threw Plaintiff to the ground. At that point,
4 Plaintiff's legs and feet went numb. Plaintiff was dragged out and transported to jail without
5 being taken to a hospital despite Bell and Park's knowledge that Plaintiff was in pain and the
6 "uselessness of [his] legs & feet." (*Id.*) At some point, Plaintiff was taken to Maricopa
7 County Hospital, which confirmed that he was injured, allegedly due to being kneed in the
8 back twice by Detectives Bell and Park. Plaintiff alleges that as a consequence of being
9 twice thrown on the ground by Bell and Park and kneed in the back, he has severe nerve
10 damage, lower lumbar separation, and back pain. Plaintiff contends that he at no time
11 struggled or resisted Bell and Park and that they used objectively unreasonable force against
12 him.

13 **III. Failure to State a Claim**

14 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
15 conduct about which he complains was committed by a person acting under the color of state
16 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.
17 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). In addition, a plaintiff must allege that he
18 suffered a specific injury as a result of the conduct of a particular defendant and he must
19 allege an affirmative link between the injury and the conduct of that defendant. Rizzo v.
20 Goode, 423 U.S. 362, 371-72, 377 (1976).

21 Plaintiff names the Mesa Police Department as a Defendant. A municipal police
22 department is not a "person" within the meaning of § 1983. See e.g., Petaway v. City of New
23 Haven Police Dep't, 541 F. Supp.2d 504 (D. Conn. 2008); Pahle v. Colebrookdale Tp., 227
24 F. Supp.2d 361 (E.D. Pa. 2002). However, a municipality is a "person" for purposes of
25 § 1983, i.e., a municipality such as a city or county, may be sued. See Leatherman v.
26 Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166 (1993);
27 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). To state a claim against a
28 municipality under § 1983, a plaintiff must allege facts to support that his constitutional

1 rights were violated pursuant to a policy or custom of the municipality. Cortez v. County of
2 Los Angeles, 294 F.3d 1186, 1188 (9th Cir. 2001) (citing Monell, 436 U.S. at 690-91);
3 Thompson v. City of Los Angeles, 885 F.2d 1439, 1443 (9th Cir. 1989)). Thus, a
4 municipality may not be sued solely because an injury was inflicted by one of its employees
5 or agents. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). Therefore,
6 a § 1983 claim against a municipal defendant “cannot succeed as a matter of law” unless a
7 plaintiff: (1) contends that the municipal defendant maintains a policy or custom pertinent
8 to the plaintiff’s alleged injury; and (2) explains how such policy or custom caused the
9 plaintiff’s injury. Sadoski v. Mosley, 435 F.3d 1076, 1080 (9th Cir. 2006) (affirming
10 dismissal of a municipal defendant pursuant to Fed. R. Civ. P. 12(b)(6)).

11 The City of Mesa Police Department is not a proper Defendant and it will be
12 dismissed. To the extent that Plaintiff sues the City of Mesa, he fails to allege facts to
13 support that the City of Mesa maintained a policy or custom that resulted in the violation of
14 Plaintiff’s federal constitutional rights or to explain how his injuries were caused by any
15 municipal policy or custom. Accordingly, Plaintiff also fails to state a claim against the City
16 of Mesa.

17 **IV. Claim for Which an Answer Will be Required**

18 Plaintiff alleges that Detectives Bell and Park used excessive force against him during
19 an arrest, when Plaintiff was complying with their orders, and after he was cuffed. Plaintiff
20 alleges that he sustained serious injuries as a consequence. Defendants Bell and Park will
21 be required to respond to the First Amended Complaint.

22 **V. Warnings**

23 **A. Release**

24 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.
25 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay
26 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result
27 in dismissal of this action.

28 **B. Address Changes**

1 Plaintiff must file and serve a notice of a change of address in accordance with Rule
2 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
3 relief with a notice of change of address. Failure to comply may result in dismissal of this
4 action.

5 **C. Copies**

6 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy
7 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
8 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit
9 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply
10 may result in the filing being stricken without further notice to Plaintiff.

11 **D. Possible Dismissal**

12 If Plaintiff fails to timely comply with every provision of this Order, including these
13 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
14 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
15 comply with any order of the Court).

16 **IT IS ORDERED:**

17 (1) Defendant City of Mesa Police Department is **dismissed** without prejudice.
18 (Doc. 9.)

19 (2) Defendants Bell and Park must answer Count I. (Doc. 9.)

20 (3) The Clerk of Court must send Plaintiff a service packet including the First
21 Amended Complaint (Doc. 9), this Order, and both summons and request for waiver forms
22 for Defendants Bell and Park.

23 (4) Plaintiff must complete and return the service packet to the Clerk of Court
24 within 21 days of the date of filing of this Order. The United States Marshal will not provide
25 service of process if Plaintiff fails to comply with this Order.

26 (5) If Plaintiff does not either obtain a waiver of service of the summons or
27 complete service of the Summons and the First Amended Complaint on a Defendant within
28 120 days of the filing of the Complaint or within 60 days of the filing of this Order,

1 whichever is later, the action may be dismissed as to each Defendant not served. Fed. R. Civ.
2 P. 4(m); LRCiv 16.2(b)(2)(B)(i).

3 (6) The United States Marshal must retain the Summons, a copy of the First
4 Amended Complaint, and a copy of this Order for future use.

5 (7) The United States Marshal must notify Defendants of the commencement of
6 this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal
7 Rules of Civil Procedure. The notice to Defendants must include a copy of this Order. **The**
8 **Marshal must immediately file signed waivers of service of the summons. If a waiver**
9 **of service of summons is returned as undeliverable or is not returned by a Defendant**
10 **within 30 days from the date the request for waiver was sent by the Marshal, the**
11 **Marshal must:**

12 (a) personally serve copies of the Summons, First Amended Complaint, and
13 this Order upon Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil
14 Procedure; and

15 (b) within 10 days after personal service is effected, file the return of service
16 for Defendant, along with evidence of the attempt to secure a waiver of service of the
17 summons and of the costs subsequently incurred in effecting service upon Defendant.
18 The costs of service must be enumerated on the return of service form (USM-285) and
19 must include the costs incurred by the Marshal for photocopying additional copies of
20 the Summons, First Amended Complaint, or this Order and for preparing new process
21 receipt and return forms (USM-285), if required. Costs of service will be taxed
22 against the personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules
23 of Civil Procedure, unless otherwise ordered by the Court.

24 (8) **A Defendant who agrees to waive service of the Summons and First**
25 **Amended Complaint must return the signed waiver forms to the United States Marshal,**
26 **not the Plaintiff.**


27 (9) Defendant must answer the First Amended Complaint or otherwise respond by
28 appropriate motion within the time provided by the applicable provisions of Rule 12(a) of

1 the Federal Rules of Civil Procedure.

2 (10) Any answer or response must state the specific Defendant by name on whose
3 behalf it is filed. The Court may strike any answer, response, or other motion or paper that
4 does not identify the specific Defendant by name on whose behalf it is filed.

5 (11) This matter is referred to Magistrate Judge Mark E. Aspey pursuant to Rules
6 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized
7 under 28 U.S.C. § 636(b)(1).

8 DATED this 28th day of September, 2011.

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12 Robert C. Broomfield
13 Senior United States District Judge
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